Washington State Court of Appeals
Division II

Docket No. 39767-6-II

Kitsap Cy. Sup. Ct. Cause No. 08-2-01979-1

JULIE HENDRICKSON,

Plaintiff-Petitioner,

-against-

TENDER CARE ANIMAL HOSPITAL CORPORATION, et al.,

Defendants-Respondents.

AMENDED APPELLANT'S REPLY BRIEF

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Julie Hendrickson, through attorney Adam P. Karp, rebuts Respondents' contentions, but preliminarily identifies ignored or conceded points, what issues are truly live, and misstatements of law and fact.

A. <u>Lack of Opposition</u>.

Respondents do not address or challenge:

- that common and statutory law impose independent tort duties upon veterinarians, not once even discussing the authorities cited in *App. Brief,* Sec. III(A)(1) at 15 and fns. 8-9, and 19-21 (citing *Loman*), or *Supp. App. Brief,* Sec. A (citing *Loman*);

- that Washington courts have repeatedly found common law independent tort duties apply to professional malpractice claims against other learned professions such as physicians and lawyers, cited in *Jackowski v. Hawkins,* 151 Wash.App. 1, 14-15 (II, 2009) as amended, *Boguch v. Landover Corp.,* 153 Wash.App. 595, 616-17 (I, 2009), and in turn to *Yeager v. Dunnavan,* 26 Wn.2d 559 (1946) and *G.W. Constr. Corp. v. Prof. Serv. Indus., Inc.,* 70 Wash.App. 360, 366 (I, 1993);

- the special relationship exception to the economic loss rule (*App. Brief,* Sec. III(A)(2));

- that Ms. Hendrickson's dog Bear did not constitute an "economic loss" but was, rather, "other property" (*App. Brief,* Sec. III(A)(3));

- that the torts of lack of informed consent (or negligent misrepresentation) and professional negligence are not only cognizable, but that fact issues warrant denial of summary judgment on the merits of those claims (*App. Brief,* Sec. III(B));

- that pre-event release language for misconduct beyond negligence (e.g., recklessness) is against public policy and unenforceable as a matter of law, per *Restatement (2nd) Contracts* § 195 and cases cited in *App. Brief,* page 11 and fn. 7; and

- the vitality and applicability of the Restatement-based, common law right to recover emotional distress damages related to reckless breach of contract, nor the *Gaglidari* case and others cited by Ms. Hendrickson, nor that fact issues exist as to recklessness and scienter (*App. Brief,* Sec. III(C) and (1) and (2)).

Accordingly, Respondents' failure to address Ms. Hendrickson's arguments stated above confirm they found no contrary authority, have no contrary arguments, and are conceding those points.[1]

B. <u>Dead Issues</u>.

Respondents insinuate, repeatedly, that Ms. Hendrickson can recover no more than Bear's fair market or replacement value. For instance, at 40, they state, "Second, before a huge, new source of liability is created, the Court should determine whether pets fit within the narrow *McCurdy* 'intrinsic value' exception."[2] But this court should and need not make such a determination because Respondents never cross-appealed Judge Mills's order denying that part of their summary judgment motion.

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[1] Failure to cite authority constitutes concession that the argument lacks merit. *State v. McNeair,* 88 Wash.App. 331, 340 (I, 1997). This court need not consider arguments undeveloped in the briefs and for which a party has cited no authority. *Bercier v. Kiga,* 127 Wash.App. 809, 824 (II, 2004). Where no authorities are cited, this court may assume that counsel, after diligent search, has found none. *DeHeer v. Seattle Post-Intelligencer,* 60 Wn.2d 122, 126 (1962).

[2] *See also, e.g., Resp. Brief,* at 3, 29 (claiming recoverable damages are "fair market value at time of loss"), 30, 41.

Besides, Respondents are plainly incorrect in their misinterpretation of well-settled case law.[3]

C. Clearly Erroneous or Misleading Statements.

Respondents make misleading assertions of fact and law to this court:

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[3] Respondents cite to *Pickford v. Masion,* 124 Wash.App. 257, 263 (II, 2004), which states as a matter of law that plaintiffs may recover actual/intrinsic value measure, not fair market or replacement. Its reference to sentimental value invokes the Washington Supreme Court decision of *Mieske v. Bartell Drug Co.,* 92 Wn.2d 40 (1979), which allowed for usual (i.e., expected) "sentimental value," defined as "governed by feeling, sensibility, or emotional idealism." *Womack v. Von Rardon*, 133 Wash.App. 254 (III, 2006), embraced *Pickford,* going so far as to hitch emotional distress to intrinsic value in creating the new tort of malicious injury. *Id.,* at 263-64. *Womack's* reading of *Pickford* was confirmed by federal district court Judge Robart in *Stephens v. Target Corp.*, 482 F.Supp.2d 1234, 1236 (W.D.Wash.,2007). The *Mieske* court, by distinguishing "usual" sentimental value from "unusual" sentimental value, at 44-45, expressly permitted some element of sentimental value, citing *Rest. of Torts* § 911 (1939). Further, the Mieske court was careful to narrowly interpret the phrase "sentimental value" so as not to exclude usual and customary sentiment:

> What is sentimental value? The broad dictionary definition is that sentimental refers to being "governed by feeling, sensibility, or emotional idealism ..." Obviously that is not the exclusion contemplated by the statement that sentimental value is not to be compensated. If it were, no one would recover for the wrongful death of a spouse or a child. Rather, the type of sentiment which is not compensable is that which relates to "indulging in feeling to an unwarranted extent" or being "affectedly or mawkishly emotional ..."

Id. (emphasis added, citations omitted). To argue that intrinsic value does not permit recovery of sentimental ties and emotional relationships, one must conclude that the *Mieske* court reasoned in error. Otherwise, how could a jury arrive at a figure of over $7500 for rolls of film containing images of family members and memorable events that could be replaced with raw negative for less than $100? Simply because those sums are not entirely susceptible to easy computation does not mean they should be disallowed. Rather, difficulty of ascertaining damages increases the loss to the person whose property has been destroyed. *Mieske*, 92 Wn.2d at 44-45. Other courts read *Mieske* this way, too. *See Jankoski v. Preiser Animal Hosp., Ltd.,* 157 Ill.App.3d 818, 820-21 (1987). This doctrine finds harmony in *Barr*, which recognizes that the law should err on the side of maximizing just compensation. *Barr v. Interbay Citizens Bank*, 96 Wn.2d 692, 700 (1981) (there is "nothing stinted" in the "exceedingly liberal" rule of compensation, allowing recovery of "every actual loss, and some which frequently border on the imaginary").

- At 5, Respondents claim appeal was taken by discretionary review. But see **CP 277** and this court's Dec. 11, 2009 order granting Ms. Hendrickson's motion to modify Comm. Schmidt's ruling and permitting "this matter to proceed as a direct appeal."

- At 27, Respondents cite to the Vogel-Short article pertaining to the Menu Foods class action to suggest that the $24 million settlement represented the fruits of a suitable legal environment that adequately compensated each plaintiff, but they fail to reference the number of claimants (24,365),[4] yielding an average payout of $738.76 of the $18 million left over after attorney's fees; the damage categories restricted by the class settlement (necropsy, euthanasia, cremation, burial, market value of deceased animal, health pet screenings);[5] and wide-spread dissatisfaction among claimants.[6]

- At 27, Respondents cite to the Associated Press article *Family gets $56,400 in dog's death* (www.seattletimes.com/html/localnews/2003031484_webdog31.html) but omit that this Oregon jury verdict reflected $50,000 in punitive damages, leaving $6000 for emotional distress and $400 for the value of Grizz, plaintiffs' 14-year-old dog run over repeatedly by the defendant. As Washington does not permit punitive damages, and Respondents ask the court to eliminate general damages, by their logic, plaintiffs would be left with a few hundred dollars.

- At 28, Respondents claim that "this decision" (meaning, this case) was broadcast on the NBC Nightly News, but the *Hendrickson* case was never so reported. They then cite to blogger Susan Thixton's article at www.truthaboutpetfood.com/articles/this-could-change-everything.html, which discusses the *Texas* Court of Appeals's decision *Medlen v. Strickland,* 353 S.W.3d 576 (Tex.App.-Fort Worth, 2011), which in "acknowledg[ing] that the special value of 'man's best

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[4] *See In re: Pet Food Products Liability Litigation*, 1:0-CV-02867-NLH-AMD (Dist.NJ)(Dkt. 389 [Opinion of Judge Hillman, Apr. 5, 2011], at 6).

[5] *Id.*, Dkt. 271 [Opinion of Judge Hillman, Nov. 18, 2008], at 4-5.

[6] *See* Ana Garcia, Tainted Pet Food Settlement Shortchanges Pet Owners, Say Some, NBC Los Angeles (Dec. 29, 2011)(noting that Kathy Forcier's cat suffered a "horrible, painful death" but only received a check for $58.76, about half the cost of the vet bills, which she characterized as "an absolute insult.") www.nbclosangeles.com/news/local/Tainted-Pet-Food-Settlement-131013283.html.

friend' should be protected," allows plaintiffs to recover for the sentimental value of their pet as a matter of law. *Id.,* at 580-81.

- At 39, Respondents cite to the Gallup News Service to suggest that most polled do not agree with general damages for pet loss even in the case of beyond-negligent misconduct, but the actual article says, "Most Americans tend to agree with state laws that usually do not allow pet owners to sue for pain and suffering damages if their pet dies due to the negligence of a third party." *See The Gallup Poll,* Public Opinion 2007, at 143.

- In the Appendix, Respondents completely mislead this court in selectively quoting *Gill v. Brown,* 107 Idaho 1137 (Id.App.1985) to suggest that Idaho will "deny[] recovery for mental anguish in pet cases." In actuality, the *Gill* court permits it: "However, a claim for damages for emotional distress and mental anguish **may be asserted** in connection with the independent torts of negligent or intentional infliction of emotional distress." *Id.,* at 1138-39 (emphasis added). Additionally, "By alleging that Brown's conduct was reckless and that they thereby suffered extreme mental anguish and trauma, the Gills have alleged facts that, if proven could permit recovery under an intentional infliction of emotional distress cause of action." *Id. Gill* rejected NIED only because "the Gills have not alleged they suffered any physical injury." *Id.*

- Also in the Appendix, fn. 2, Respondents concede the point made by Ms. Hendrickson that *Smith v. Univ. Animal Clinic, Inc.,* 30 So.3d 1154 (La.App.2010), a contract case, allowed for emotion-based damages upon breach by a veterinary clinic providing boarding services to plaintiff's cat. They then try to distinguish it from *Keller v. Case,* 757 So.2d 920 (La.App.2000), saying it applied "traditional damages against a boarding facility over pet's death," but this is a mischaracterization. *Keller* involved suit against a boarding stable for the negligently-caused death of a thoroughbred. The *Keller* court actually reversed summary judgment dismissing her claim against the insurance company "for personal injuries suffered as a result of the alleged negligence of Hunter's Bluff employees," i.e., mental anguish arising from the negligent killing of her horse (at 924).

- Elsewhere in the Appendix, Respondents paint the holdings of all other States in an utterly false light by telling only that half of the story

which is irrelevant to the narrow issue of recovering noneconomic damages for recklessness. *See attached Rebuttal Appendix.* They also cite to *Bales v. Judelsohn,* an unpublished South Carolina opinion (that counsel could not find using Westlaw). It should be disregarded per GR 14.1(b).

D. Independent Duty Doctrine.

Respondents spent vast amounts of time attempting to revive an outmoded, nearly century-old, Cardozoian "risk of harm analysis" and a quarter century-old (since recast) holding of *Stuart* notwithstanding Supreme Court decisions of *Eastwood, Affiliated,* and *Jackowski.*

1. *Limited Application of Doctrine to Bar Tort Remedies.*

Elcon Constr., Inc. v. EWU, 174 Wn.2d 157 (2012), cited by Respondents at 10, proves judicious in several respects, particularly at page 165 (emphasis added):

¶ 12 The independent duty doctrine is "an analytical tool used by the court to maintain the boundary between torts and contract." *Eastwood v. Horse Harbor Found., Inc.,* 170 Wash.2d 380, 416, 241 P.3d 1256 (2010)(Chambers, J., concurring). In *Eastwood,* we adopted the term "independent duty doctrine" because it more accurately captured the principle behind the rule: "An injury," we held, "is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract." *Eastwood,* 170 Wash.2d at 389, 241 P.3d 1256. **To date, we have applied the doctrine to a narrow class of cases, primarily limiting its application to claims arising out of construction on real property and real property sales**. "We have done so in each case based upon policy considerations **unique to those industries. We have never applied the doctrine as a rule of general application outside of these limited circumstances**." *Eastwood,* 170 Wash.2d at 416, 241 P.3d 1256 (Chambers, J., concurring). **Indeed, in **970*Eastwood* we directed lower courts not to apply the doctrine to tort remedies "unless and until this court has, based upon considerations of common sense,**

justice, policy and precedent, decided otherwise." *Eastwood,* 170 Wash.2d at 417, 241 P.3d 1256 (Chambers, J., concurring).

That this case does not arise in the construction or realty sale context, and that the Supreme Court has not directed lower courts to apply the independent duty doctrine to the veterinary, legal, or medical contexts, *Elcon* compels reversal. *See also* cases cited in *App. Brief,* 11-12.

2. *Sophistication of Consumer Factor.*

At 16, Respondents distinguish sophisticated from unsophisticated consumers, stating that the latter, comprised of general contractors, developers, and design professionals, are privy to the economic risk associated with their business and properly subject to the restraints imposed by the economic loss rule. They then assert (emphasis added), without any factual basis:

Similarly, people who pay for veterinary services are in a small percentage of pet owners who do and are not uneducated.

Merely owning a pet is not a profession. And the majority of pet owners "pay for veterinary services," so there is nothing unique to such a subclass. *See App's Stmt of Addl. Auth.* (Jan. 25, 2010). Indeed:

Veterinary Economics magazine reports that 47% of surveyed pet owners "would spend any amount necessary" on veterinary care to save ***207** a pet's life. [FN236] A full 73% said they would spend at least $1,000 to keep their pet alive. [FN237] The value of companion animals may even supersede wealth effects, as the American Animal Hospital Association has further found that 75% of pet owners would go into debt to care for their pet. [FN238] More precisely, a 700-page economic study

commissioned by the veterinary profession determined that dog and cat owners would spend an average of $92 a month to maintain their companion animal's health. [FN239] This would equate to over $13,250 in veterinary expenditures alone during the pet's lifetime. [FN240]

These assessments are confirmed by the actual dollar amounts that Americans do spend on veterinary treatment and care. [FN241] In raw dollars, the majority of dog owners each spent more than $350 on veterinary care in 2001, [FN242] with nearly one out of four households spending over $1,000.[FN243] This is not surprising, as the average veterinary treatment price for each of the three most common pet injuries is over $1,200, with the most prevalent, a fracture, costing $1,774. [FN244]

Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals,* 10 Animal L. 163, 206-07 (2004).

Further, the phrase "not uneducated" is undefined, but Respondents appear to suggest (but in no way support) that most pet owners bear credentials such as a college degree in business or veterinary medicine. The court should reject the notion that ordinary pet owners, on average, in any way resemble sophisticated contract negotiators like general contractors, developers, or design professionals. It follows, therefore, that the Supreme Court's logic in *Berschauer* would not foreclose tort remedies to pet owners bringing claims against veterinarians. One must scrutinize the cognitive dissonance then facing the Supreme Court.

In *Berschauer,* not a products liability case, sophisticated plaintiffs attempted to recover tort remedies against sophisticated defendants. In

persuading the court to invoke the economic loss rule, defendants referenced the Legislature's restricting unsophisticated plaintiffs suing under Ch. 7.72 RCW to only contract remedies under the UCC. Were it not for the statutory limitation, a move made by the Legislature and not the courts, the defendants would not gathered the rhetorical momentum needed to convince the Supreme Court to restore the equilibrium between luddite and erudite.

But outside the products liability context, unsophisticated consumers are not statutorily limited to contract remedies. Hence, the playing field-leveling rationale of *Berschauer* has no application here, except to emphasize that the Legislature has not spoken (as it did under Ch. 7.72 RCW) in such a way as to restrict pet owners to contract remedies. Therefore, the judiciary should not seek to conform the common law to some nonextant statutory limitation.

Furthermore, Respondents do not dispute the disparity in scientific knowledge, training, expertise (i.e., sophistication) between the veterinarian as a learned intermediary and the typical client. *See App. Brief,* Sec. III(B) and *Supp. App. Brief,* at 2-3 (quoting *Loman*). Nor could they. The *Jarrard* case, cited by Respondents, only brings home the point by, at 479-80, affirming judgment for plaintiffs in tort against surveyors and professional engineers and stating they were "entitled to rely on that

superior knowledge and to expect that such professionals would fulfill the duty of reasonable diligence, skill, and ability," even going so far as to use the phrase "standard of care."

3. *Noncommercial Nature of Veterinary Relationship.*

In urging, at 17, for a commercial expectation analysis, Respondents assume, but in no way prove with any authority or fact, that the average person brings her animal companion to a veterinarian with commercial expectations. While feedlot operators, who keep thousands of head of cattle, or egg producers, who warehouse millions of hens, no doubt only have commercial expectations, the average pet owner, like Ms. Hendrickson, would never endorse such a depiction.[7] Indeed, the veterinary industry itself has repeatedly acknowledged and even trained its members to solicit, market, and profit from the non-commercial expectations of the average pet owner. *See App. SOAA* (turning profit for the human-animal bond, which even Respondent's witness Dr. Patrick Gavin concedes is "an admittedly very real phenomenon" (**CP 159**)). Moreover, Washington and Ninth Circuit courts have consistently found

[7]*But see A.J. Decoster Co. v. Westinghouse Elec. Corp.,* 634 A.2d 1330 (Md.1994)(economic loss rule did not apply when a farmer lost 140,000 chickens after a defective transfer switch failed to activate, the Maine high court finding chickens were not economic losses).

that the relationship between an animal companion and her owner-guardian is not commercial.[8]

4. *Engineers vs. Veterinarians.*

At 19, Respondents try to revive the stale *Stuart* factors, described at 420-21 as "nature of the defect, the type of risk, and the manner in which the injury arose," even though the Supreme Court long left that trio behind, and despite Respondents acknowledging the courts have "lost sight of this analysis by focusing instead on the nature of the cause of action pleaded." In *Eastwood,* at 392, the Supreme Court pushed aside the factors Respondents ask this court to invoke, distilling *Stuart* thusly:

> The ultimate question was whether the builder-vendor was under an independent tort duty to avoid the condominium owners' injury, and we concluded not.

With respect to professionals like engineers, *Affiliated*, at 453, allowed tort liability *in addition to* contract liability by recognizing they "occupy a position of control, [and] they are in the best position to prevent harm caused by their work," much like veterinarians who serve as bailees and professionals charged with making life-and-death decisions for people's animals. *Affiliated* adds that tort liability "would force negligent engineers

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[8] *See App. Brief,* at 35; *see also Downey v. Pierce Cy.,* 165 Wash.App. 152, 165 (II, 2011)(describing pet owners' interests in keeping their pets as "arguably more than a mere economic interest because pets are not fungible"); *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose,* 402 F.3d 962, 975 (9th Cir.,2005)("The emotional attachment to a family's dog is not comparable to a possessory interest in furniture.")

to internalize the costs of their unreasonable conduct, making them more likely to take due care," a logic that applies equally to veterinarians. Further, *Affiliated* states that "engineers have ample training, education, and experience, and can use their professional judgment about the design needs of a particular project," thereby "placing responsibility in the hands of the persons who can best mitigate the risks … could reduce the overall social costs." Like engineers, veterinarians tout similar (if not greater) expertise and acumen.

Interestingly, *Affiliated* also cites to *Ultramares v. Touche,* 255 N.Y. 170 (1931), a case relied upon by Respondents, at 17-18, in urging a "risk of harm analysis" and exaggerating the economic drawbacks of the danger in creating indeterminate liability. It dispenses with *Ultramares* by stating:

> [W]e think economic concerns about liability run amok are overstated and can be addressed through conventional concepts of the measure and scope of a duty of care.

Id., at 454.

5. *The Imaginary Threat to Human Life or Catastrophic Property Damage Rule.*

At 22, Respondents cite to *Affiliated* to suggest the existence of a rule that only allows plaintiffs their tort remedies in instances of threat to

human safety or catastrophic property damage. *Affiliated,* a case that did not involve any injury to a human or property beyond the Monorail itself (see 452), remarked (also at 452):

> An interest we must consider is the safety of persons and property from physical injury, an interest that the law of torts protects vigorously. See DOBBS, supra, § 1, at 3 ("Legal rules gives the greatest protection to physical security of persons and property.")

However, it did not condition tort recovery on anything other than the existence of an independent tort duty. Hence, Respondents' contention that Ms. Hendrickson's position is "logical only if the Court had overruled all of the cases limiting claims lacking personal injury or catastrophic property damage to the remedies of the contract," relies on the false premise that <u>any</u> <u>case</u> bars tort remedies even where an independent tort duty exists except in the case of personal injury or property damage ("catastrophic" or otherwise).

At 24, Respondents quip that the independent duty doctrine "does not apply here because there was no risk to human life or damage to other property." They add, "Both *Affiliated* and *Eastwood* involved, at least impliedly, risk of harm to people and damage to property other than the property that was the subject of the contract." Importantly, both of these

cases, as well as *Jackowski,* involved damage to property that was the subject of the contract yet the court allowed tort remedies.[9]

At 23, Respondents state that the type of risk was "commercial loss only; nobody's person or other property was damaged." Respondents then assert that the only misconduct at issue is:

failure to diagnose; no conduct by Ridgetop created a risk of harm to the safety of Ms. Hendrickson's person or other property.

Yet there was never any doubt that Respondent Cage properly diagnosed bloat, the sarcastic and tangential meanderings of Dr. Patrick Gavin aside.[10] Her error was failing to treat the obvious, life-threatening

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[9] While *Affiliated* did discuss risk of harm to passengers on the Monorail, the court said, "The record before us does not indicate whether any passengers on the monorail were injured or if the fire caused damage to property beyond the Seattle Monorail." *Affiliated,* at 452. *See also Eastwood,* at 383-84 (lessees allowed horse urine and feces to accumulate, pools of standing water, broken fencing, causing waste to leased land); *Affiliated,* at 444 (defendant was under contract to maintain monorail itself); *Jackowski* (involving sale of home and land on which it was situated, later destroyed by landslide).

[10] That Dr. Gavin states generally the radiographs is a "complex judgment" and "rife with error," even among boarded radiologists, has nothing to do with whether Bear's incident radiograph was difficult to interpret. Dr. Cage had no trouble reading the film on the night he died, as the chart notes diagnose "bloat," and neither Dr. Cage, Ms. Hendrickson's expert Dr. Kern, nor even Dr. Gavin had trouble interpreting the large bubble of gas invading Bear's entire abdomen. See **CP 122-23** (Kern: observing that film involves "the **entire** abdomen" with a "severe" degree of distention, and error was in not reacting to the evident findings of the radiograph, which was recognized in the notations made by Ridgetop staff), **158** (Gavin: noting that he "examined the films in this case," but never comes out and says that Dr. Cage misinterpreted them as bloat, or himself interprets anything other than bloat; indeed, Gavin does not discuss at all the standard of care upon diagnosing bloat, as Cage did), **198** (Cage: observing "large accumulation of gas, presumably in the stomach"). Also consider that Cage ordered radiographs without Ms. Hendrickson's knowledge or consent – ostensibly because Cage had concern over Bear's distention and lethargy. On arrival at Ridgetop, Ms. Hendrickson even asked, "Why is his belly so big?" to which an employee responded, "He threw up a lot and swallowed lots of air," showing pale gums. **CP 110-111.**

condition after noting the well-defined gas-dense area (distension) in Bear's stomach, extending over the length of his body, while also observing his gums were pale. She also failed to adequately inform Ms. Hendrickson of the risks and alternatives for treatment of Bear's emergent condition.[11]

These failures imperiled not only the safety of Ms. Hendrickson, but also Bear as the "other property." Indeed, it was foreseeable Bear needed emergency care, which could not be provided by Ms. Hendrickson and her home and would require travel to an emergency facility, potentially in the middle of the night. She would not have the benefit of advanced warning and leisurely passage, but would be predictably seized by panic, her attention distracted by tending to her dying dog and keeping her eyes on the road, jeopardizing not just the health and safety of the owner, but others on the road, as well as other property (viz., vehicles, utility poles, and dwellings on or adjacent to the road).[12] Bear is also

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[11] Accordingly, her recklessness relates to not assessing the gravity of the cardiovascular risk caused by the size of the distension in his stomach, not taking his blood pressure or performing an electrocardiogram to further assess the cardiovascular effects of the distension, not proceeding to progressively decompress the area of distension in his stomach while ensuring he had enough fluids to avoid shock, not retaining Bear for observation or referring him to an emergency clinic for observation once he stabilized after the decompression, not talking to Ms. Hendrickson directly to relate this information, and not putting any of the information in writing.

[12] That Ms. Hendrickson found a driver so she could perform CPR en route to the emergency clinic does not diminish the harried and deeply unsettling experience of

properly characterized as "other property," a point Respondents do not even respond to.

An apt analogy is made to *Jackowski,* where homebuyers sued sellers, the broker, and agent of the home for failure to disclose the risk that a landslide could (and later did) damage their house. Like *Jackowski,* the Respondents failed to disclose the substantial and unreasonable risk of harm facing Bear from his untreated and undisclosed bloat condition. The natural phenomenon of a landslide and the biological phenomenon of bloat both could have been guarded against by prophylactic measures and full disclosure – neither of which occurred, thereby causing harm to "other property" (i.e., the Jackowskis' home and Ms. Hendrickson's dog).

6. *The Hendrickson-Ridgetop Contract.*

At 23, Respondents say that the risk of harm was "directly addressed in the contract" with the parties agreeing to its allocation. Yet they fail to quote from this contract. **CP 152.** At the outset, *Affiliated,* at 450 n.3, quotes *Eastwood,* at 388-89, which says, "Thus, the fact that an injury is an economic loss or the parties also have a contractual relationship is not an adequate ground, by itself, for holding that a plaintiff is limited to contract remedies." Further, the contract says not a word

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racing against time to save a beloved dog's life.

about allocation or risk, determination of potential future liability, or any attempt to limit remedies, except in ways having no bearing on this case.[13]

To begin with, Ms. Hendrickson agreed not to hold Respondents liable "for treatment or safekeeping beyond his/her control of animal stated below." But there was never a question of Respondents lacking control due to an intervening, superseding cause. The other germane section actually mandates that Respondents "use all reasonable precaution against injury, escape, or death of my pet," – viz., a negligence standard. And the final boilerplate section agrees not to hold Respondents liable "in connection" with the purportedly "minimal risk" of "sedation/anesthesia."

Putting aside whether sedation and anesthesia only carry a minimal risk, regardless of age, hereditary, congenital, or developmental conditions, chemical sensitivities, or organ failure, it is undisputed that Bear did not die from sedation or anesthesia: he died from failure to decompress his bloated abdomen. Further, there is no evidence that anyone at Ridgetop, including Cage, specifically informed Ms. Hendrickson of any risks or complications that might arise from sedation or anesthesia. Using boilerplate language in a contract without any

[13] But even if the contract somehow did limit remedies, public policy would invalidate such a provision relative to reckless breach of bailment since pre-event release language for intentional and reckless injury is against public policy. *See Restatement (2nd) of Contracts* § 195, and cases in *App. Brief*, at 11 and fn. 7.

evidence of actually communicating that information cannot magically create something from nothing.

Besides, health care-related exculpatory clauses violate public policy and are void. *See App. Brief,* at 10. In regulating the practice of veterinarians, Washington's Veterinary Board of Governors protects the public interest. In so doing, it retains the right to suspend or revoke a veterinarian's license for "unprofessional conduct." Examples of such untoward behavior include acting in a manner endangering the health and welfare of patients and the public, or in a fashion that does not exercise reasonable skill and safety. Accordingly, when a veterinarian jeopardizes the nonhuman animal through lack of reasonable skill or safety, she violates a duty imposed by statute. RCW 18.130.180(4). Any effort to disclaim liability for such conduct should be void as against public policy, as in the case of human health care professionals.

Further, "professional bailees," like garagepersons, may similarly not exempt themselves from liability for their own negligence. *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217 (1990)(en banc). Respondents are professional bailees. In determining whether the exclusionary clause violates public policy, Washington looks to whether the following characteristics exist:

1) The transaction concerns a business of a type generally thought suitable for public regulation.

2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.

3) The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.

4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.

5) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

6) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Wagenblast v. Odessa Sch. Dist., 110 Wn.2d 845, 851-52 (1963). The *Wagenblast* factors favor Ms. Hendrickson.[14]

[14] The first is satisfied given the governmental regulation of veterinarians and comparative treatment of veterinarians to medical doctors, even under federal law. *See Clark v. United Animal Emergency Clinic, Inc.,* 390 F.3d 1124, 1127 (9th Cir.2004)(finding veterinarians fell within the "practice of medicine exception" to the overtime requirements of Fair Labor Standards Act based on ordinary, dictionary definition and, adding, "The science and art of healing and maintaining health-*i.e.,* medicine-can be and is practiced on animals as well as humans. Logically as well as linguistically, veterinary medicine is a "branch" of medicine.") The second and fourth factors are supported by the numerous decisions cited in Washington by Ms. Hendrickson in *App. Brief,* at 35, that recognize the familial and emotional significance of pets in our lives, and that only a licensed veterinarian may treat nonhuman animals except, for instance, the animal's owner – but most owners do not have the training and inventory to safely, humanely, and competently perform veterinary medicine. Veterinarians openly advertise their skills to the general public, as do Respondents, satisfying the third factor. From all appearances, **CP 152** is a standard adhesion contract with no ability to pay more to protect against negligence, satisfying factor five. And the

Additionally, exculpatory clauses are not only disfavored but construed strictly and against the party seeking relief from liability. *See Vodopest*, at 848. They also must unambiguously state that a customer releases the party from liability for its own negligence.[15] In this case, the word "risks" is used, not negligence. A negligent vet is not a risk and certainly not one assumed by the client. Respondents' form never uses the language "negligence" or "negligent."

At 24, fn. 8, Respondents say:

> this is a classic services contract: owner pays money to Ridgetop and, as consideration, Ridgetop performs professional services that comport with the standard of care.

Regardless, *G.W.Constr.* and *Yeager* clearly state that a professional service contract merely augments tort liability. It does not and cannot vitiate it.

E. Emotional Distress Recovery under *Gaglidari/Restatement.*

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last factor favors Ms. Hendrickson since in every instance where an animal is left with a veterinarian for treatment, surgery, or monitoring (as here), a bailment arises, and the owner is at the mercy of the veterinarian to exercise due care.

[15] *Kitchens of the Oceans, Inc. v. McGladrey & Pullen, LLP*, 832 So. 2d 270, 273 (Fla. 4th DCA 2002) (finding hold-harmless provision must "specifically and clearly" provide that a customer agrees to release a business "from their own negligence."); *Goyings v. Jack and Ruth Eckerd Foundation*, 403 So. 2d 1144, 1146 (Fla. 2d DCA 1981) (finding exculpatory clause "ineffective because it did not explicitly state that the [defendant] would be absolved from liability for injuries resulting from its negligence.").

As a threshold matter, Respondents persist in conflating property damage (i.e., intrinsic value of deceased animal) with personal injury (i.e., mental anguish arising from death of an animal), neither of which is mutually exclusive nor inclusive. The ability to recover the former depends not a whit on the degree of tortfeasor culpability, but rather on the characteristics of the property lost, damaged, or destroyed; the ability to recover the latter, on the other hand, depends entirely on culpability. In other words, *Mieske* does not allow a plaintiff to advance to intrinsic value simply because the defendant *maliciously*, as opposed to *negligently*, destroyed his personalty, rendering mental state legally immaterial.

With respect to personal injury, however, *Womack* and *Sherman* allow the plaintiff to recover emotional distress damages where the tortfeasor has damaged or destroyed personalty intentionally or maliciously, in addition to the property damage claim. Think of degree of culpability as a common law "enhancement" to property damage claims. Such a construct serves two distinct public policies: to reimburse the plaintiff for the value of her personalty and to compensate her for foreseeable emotional harm where the defendant's fault exceeded mere negligence, thereby deterring more aggravated forms of culpability. While Respondents catalog decisions from numerous States that have rejected recovery of general damages based on *negligent* property destruction, they

cite not one decision that forbids recovery for *reckless, grossly negligent, intentional,* or *malicious* property destruction as a matter of law. For that reason, the nationwide trend compels this court to permit recovery for recklessness.

As to *Gaglidari*'s applicability, Respondents stand mute. Instead, at 25, they attempt to dissuade the court with knee-jerk sensationalism, decrying a scientifically unsupported and completely speculative "new wave of pet litigation" and "major adverse impacts on pets in this state."[16] More importantly, they speak past the issue before *this* court – should emotional distress damages be permitted in the case of *reckless, wanton,* or *malicious* breach of contract? Ms. Hendrickson did not and does not ask this court to allow noneconomic damages in the case of *negligence,* yet that is all Respondents address. Respondents also ignore that the

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[16] *See Green, supra*:

> Surprisingly, though, the assertion that veterinary costs and prices will dramatically rise as a result of increased compensation is commonly made and accepted without any mathematical verification. Even academic advocates of higher civil damages for animal loss often feel obliged to concede that the potential for ancillary increases in veterinarians' liability exposure is the Achilles heel of their argument.[FN15] In actuality, the exact opposite may be true: The near total absence of veterinary negligence deterrents under current law may turn out to be the strongest economic reason for draining the baby's bath water as soon as politically possible.

Id., at 168. Mr. Green undertakes the mathematical analysis, using the insurance industry's own figures. *Id.*, at 218-21.

Washington Court of Appeals has allowed emotional distress recovery related to *intentional* (even in good faith) injury or death to an animal.[17]

Additionally, their position is unabashedly hypocritical, given that veterinarians openly exploit and seek to profit from the human-animal bond in the examination room, yet price the dog as obsolete and depreciated like an old Buick in the courtroom. *See App. SOAA.*[18] Finally, their mantra to let the legislature resolve this issue ignores completely that personalty valuation and recovery of emotional damages for reckless breach of contract were always common law doctrines, never made in consideration of a legislative prerogative. The same applies to the common law doctrines of NIED and IIED, making Respondents' reference to HB 2945, at 42, utterly beside the point.[19] Lastly, Respondents' Appendix seriously misleads this court. *See* § C and fn., and *Rebuttal Appendix* herein.

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[17] *Sherman v. Kissinger,* 146 Wash.App. 855, 873 fn. 8 (I, 2008)(conversion and trespass to chattels claims); *Womack v. von Rardon,* 133 Wash.App. 254, 263-64 (III, 2006)(malicious injury to a pet).

[18] *See also* Rebecca Huss, *Valuation in Veterinary Malpractice*, 35 Loy. U. Chi. L.J. 479, 531 (Wtr. 2004) "[v]eterinarians [who] emphasize the importance of the human-animal bond … should not be able to then argue that the bond is irrelevant when it is time to determine damages in malpractice actions."

[19] The sponsors of the bill were attempting to extend from livestock to companion animals a *legislative* remedy providing for treble damages and reasonable attorney's fees involving theft and cruelty. Legislatures reject bills for any number of reasons, including simply running out of time or political triage. Ms. Hendrickson asks this court to confirm the applicability of well-established *judicial* remedies at common law.

For the reasons stated in her opening brief, the court should permit recovery of emotional damages under the *Gaglidari*/Restatement doctrine given the trend of Washington and Ninth Circuit appellate courts repeatedly recognizing the emotional connection shared with our animal companions, rendering any contract for the care of same the type that would indubitably create mental anxiety for nonpecuniary reasons, especially when those soliciting such business do so while using such marketing terminology as "Tender Care" and proclaiming their philosophy of treating "your pet as we would our own."

As discussed in *Gaglidari,* at 445, and furthered by *Price v. State,* 114 Wash.App. 65, 73 (II, 2002), in determining if a contract qualifies for the *Gaglidari* remedies, one asks whether a reasonable person in the defendant's position would conclude, at the outset, that emotional suffering for nonpecuniary reasons would be rendered by the type or character of the contract, viewed from the defendant's position. A veterinarian whose livelihood depends on the emotional bond cannot seriously deny such foreseeability.[20]

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[20] In addition to the authorities cited in *App. Brief,* consider *Grather v. Tipery Studios, Inc.,* 334 So.2d 758 (1976, La.App.)(allowing noneconomic damages related to unprofessionally photographed wedding pictures *when professional hired); Mitchell* v. *Shreveport Laundries, Inc.,* 61 So.2d 539 (La.App.1952)(allowing noneconomic damages related to laundry agent failing to deliver groom's only clean and fitting suit in time for wedding); *Lane v. KinderCare Learning Centers, Inc.,* 231 Mich.App. 689

F. Conclusion.

Respondents' overstated, unfounded, business-as-usual approach should be rejected and the windfalls veterinary tortfeasors have enjoyed for far too long ended. At 43, Respondents seek reasonable attorney's fees but cite no authority. There is none.

Dated this Oct. 10, 2012

ANIMAL LAW OFFICES

Digitally signed by Adam P. Karp
Location: Bellingham, WA
'Date: 2012.10.10 12:52:15 -07'00

Adam P. Karp, WSB No. 28622
Attorney for Plaintiff-Petitioner

(1998)(allowing noneconomic damages to mother in breach of contract by day care involving care of 18-month-old).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Oct. 10, 2012, I caused a true and correct copy of the foregoing, to be served upon the following person(s) in the following manner:

[x] Email (agreement)

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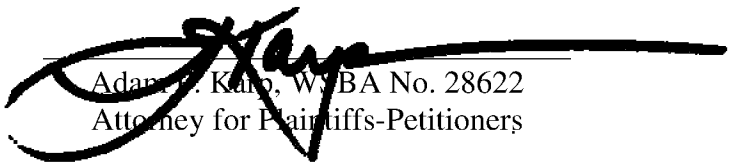

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REBUTTAL APPENDIX

Taking each case in turn:

- **Alaska:** *Mitchell v. Heinrichs,* 27 P.3d 309, 311-12 (Ak.2001) reiterates that it permits IIED relative to the intentional or reckless killing of a pet animal;

- **Arizona:** *Kaufman v. Langhofer,* 223 Ariz. 249, 254 and 256 fn.13 (2009) explicitly does not decide whether the pet owner may recover sentimental value, but does acknowledge that "Several states allow damages for the intentional infliction of emotional distress when a pet is injured or killed through intentional, willful, malicious, or reckless conduct," and adds that Arizona law may allow recovery of such damages "when [plaintiff] sustains an economic loss involving fraud, intentional conduct, or a willful fiduciary breach";

- **California:** *McMahon v. Craig,* 176 Cal.App.4th 1502, 1515-16 (2009) does not categorically eliminate the cognizability of an IIED claim against a veterinarian, and the recent case of *Plotnik*, allows emotional damages for IIED and trespass to chattels; Defendants do not reveal the latest decision of *Plotnik v. Meihaus*, 146 Cal.Rptr.3d 585, 598-99 (Cal.App.4, 2012), distinguishing *McMahon* by rejecting the argument of Meihaus, responsible for hitting the Plotniks' Min-Pin with a baseball bat, that California "[has] rejected the concept that an animal owner may recover emotional distress damages due to injuries his animal received at the hands of a[nother]…." *Id.*, at 599. In upholding the general damages award based on a trespass to chattels theory, the court quoted *Johnson v. McConnell*, 80 Cal. 545, 549, where it noted:

> While it has been said that [dogs] have nearly always been held "to be entitled to less regard and protection than more harmless domestic animals," it is equally true that there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt.

Id., at 600. The court justified this position by citing to a case involving damage to inanimate property, *Gonzalez v. Personal Storage, Inc.,* 56 Cal.App.4th 464, 477 (1997), chronicling decisions providing for pain, suffering, and emotional distress related to breach of contract, fraud, conversion, and nuisance. *Id.* Indeed, *Plotnik* cited to Washington's *Womack* decision. *Id.* Additionally, *Plotnik* acknowledged the vitality of IIED, distinguishing *McMahon* since, "Here, the evidence supported a conclusion Meihaus went to his garage, retrieved a bat, and used it to intentionally strike Romeo." *Id.*, at 603. IIED has a variant – reckless infliction. *Strong v. Terrell,* 147 Wash.App. 376, 385 (II, 2008).

- **Connecticut:** while *Myers v. City of Hartford,* 84 Conn.App. 395 (2004) is quoted accurately, but omits that it remains an open question in Connecticut whether a bystander plaintiff may noneconomic damages for the loss of a pet, as the court conditioned its ruling "when the plaintiff has not witnessed the fatal injury," at 403;

- **Delaware:** *Naples v. Miller,* 2009 WL 1163504 (Del.Super.2009), at *3 and fn.9, only rejected NIED but implied that plaintiff could recover noneconomic damages if there was impact upon Ms. Naples, she was in the zone of danger, or there were "aggravating circumstances where intentional or reckless conduct was involved";

- **Florida:** *Kennedy v. Byas,* 867 So.2d 1195 (Fla.App.2004) only precludes negligence-based noneconomic damages;

- **Georgia:** *Holbrook v. Stansell,* 254 Ga.App. 553 (2002) only spoke to NIED and negligent conduct;

- **Idaho:** *Gill v. Brown,* 107 Idaho 1137 (1985) – *see Reply Brief*;

- **Illinois:** *Jankoski v. Preiser Animal Hosp., Ltd.,* 157 Ill.App.3d 818 (1987) states that "The concept of actual value to the owner may include some element of sentimental value …," in accord with *Mieske*, but it did not address noneconomic damages as plaintiffs were not seeking them (see 820);

- **Indiana:** *Lachenman v. Stice,* 838 N.E.2d 451 (Ind.App.2005) only rejected NIED as a matter of law, but not IIED;

- **Iowa:** *Nichols v. Sukaro Kennels,* 555 N.W.2d 689 (Iowa 1996) only rejected NIED and did not close the door to malicious injury;

- **Kansas:** *Burgess v. Shampooch Pet Indus., Inc.,* 35 Kan.App.2d 458 (2006) never even uses the word "sentimental," but instead allows recovery of veterinary bills in excess of acquisition price based on what it calls "long-standing common-sense jurisprudence," at 463, approves of a "special value to the owner" instruction" akin to Washington State's, at 461, while rejecting defendant's "hyperbolic[]" claims that its ruling would "open the proverbial 'floodgates' of high dollar litigation on behalf of animals…," at 465;

- **Kentucky:** *Ammon v. Welty,* 113 S.W.3d 185, 188 (Ky.App.2002) states, "Simply because a claim involves an animal does not preclude a claim for intentional infliction of emotional distress";

- **Louisiana:** *Kling v. U.S. Fire Ins. Co.,* 146 So.2d 635 (La.App.1962) does not speak to noneconomic damages whatsoever;

- **Massachusetts:** *Krasnecky v. Meffen,* 56 Mass.App.Ct. 418 (2002) only rejected NIED;

- **Michigan:** *Koester v. VCA Animal Hosp.,* 244 Mich.App. 173, 177 (2000) only involved NIED;

- **Minnesota:** *Soucek v. Banham,* 503 N.W.2d 153, 164 (Minn.App.1993) rejected NIED only;

- **Missouri:** *Wright v. Edison,* 619 S.W.2d 797 (Mo.App.1981) never discussed noneconomic damages related to animal injury or death at all;

- **Nebraska:** *Fackler v. Genetzky,* 595 N.W.2d 884, 892 (Neb.1999) only rejected NIED;

- **Nevada:** *Thomson v. Lied Animal Shelter,* 2009 WL 3303733 (D.Nev.2009) did not *per se* reject IIED but simply found defendants' conduct not sufficiently outrageous, and it further noted there was no state law on point relative to NIED or IIED (at *7), and NRS 41.740 is a nonexclusive statutory cause of action;

- **New Jersey:** *Harabes v. The Barkery,* 791 A.2d 1142 (N.J.Super.2001) only involved negligence, and the court noted that "in this case plaintiffs do not allege, and there is no evidence to suggest, that plaintiffs' dog died as a result of intentional, willful, malicious or reckless conduct by the defendants" (at 1144);

- **New Mexico:** *Wilcox v. Butt's Drug Stores, Inc.,* 38 N.M. 502 (1934) said nothing about noneconomic damages, but applied a *per se* intrinsic value rule to death of an animal;

- **New York:** *DeJoy v. Niagara Mohawk Power Corp.,* 786 N.Y.S.2d 873 (N.Y.A.D.2004), a ten-line opinion, merely rejected the claim for loss of companionship, but said nothing about noneconomic damages arising from beyond-negligent conduct;

- **North Carolina:** *Shera v. N.C. State Univ. Teahing Hosp.,* 723 S.E.2d 352 (N.C.App.2012) involved stipulated negligence only (see 353);

- **Ohio:** *Pacher v. Invisible Fence of Dayton,* 798 N.E.2d 1121 (Ohio App.2003) noted that "the allegations refer only to negligence and breach of contract, not misconduct" (at 750);

- **Oregon:** *Lockett v. Hill,* 182 Or.App. 377 (Or.App.2002) only rejected NIED but left open the question of recovering noneconomic damages for public nuisance (at 383 and fn.1);

- **Pennsylvania:** *Daughen v. Fox,* 539 A.2d 858 (Pa.Super.1988), only rejected IIED but never spoke to the theory raised by Ms. Hendrickson;

- **Rhode Island:** *Rowbotham v. Maher,* 658 A.2d 912 (R.I. 1995) rejected noneconomic damages under a Rhode Island statute and NIED;

- **Texas:** *Petco Animal Supplies, Inc. v. Schuster,* 144 S.W.3d 554 (Tex.App.-Austin 2004) only denied noneconomic damages arising from negligence;

- **Vermont:** *Goodby v. Vetpharm, Inc.,* 186 Vt. 63 (2009) only negated NIED;

- **Virginia:** *Kondaurov v. Kerdasha,* 271 Va. 646 (2006) only restricted plaintiffs from recovering noneconomic damages from "ordinary negligence";

- **Washington:** while *Sherman v. Kissinger,* 146 Wash.App. 855 (2008) did prohibit recovery of emotional distress damages for loss of the human-animal bond, Respondents ignore – in the same paragraph, at 873 fn. 8, that recovery of emotional distress damages for intentional torts to animals would be consistent with the modern rule;

- **West Virginia:** *Carbasho v. Musulin,* 217 W.Va. 359 (2005) exclusively dealt with emotional distress "as an element to be considered in determining her property damage," adding that her causes of action for NIED and IIED were resolved by settlement (at 361 fn. 2);

- **Wisconsin:** *Rabideau v. City of Racine,* 627 N.W.3d 795 (Wis.2001) affirmed summary judgment to defendants on NIED per se but on IIED only on evidentiary grounds.

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